



Hamilton Square 600 14<sup>th</sup> Street NW Suite 750 Washington DC 20005  
T> 202-220-0400 F > 202-220-0401

November 24, 2004

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; WC Docket No. 01-338

Dear Ms. Dortch:

Yesterday, Marc Goldman of Jenner and Block and I, on behalf of Covad Communications, met with Jeffrey Carlisle, Robert Tanner and Pamela Arluk of the Wireline Competition Bureau. The purpose of the meeting was to discuss Covad's letter filed November 19, 2004, opposing the extension of the current EELs eligibility criteria to high-capacity loop UNEs. No additional materials were presented at the meeting.

Covad also writes herewith to further explain its opposition to the extension of the current EELs eligibility criteria to standalone high-capacity UNEs (e.g., UNE DS-1 and DS-3 loop facilities). As explained in Covad's November 19 letter referenced above, these eligibility criteria were not designed to accommodate the provision of data telecommunications services on UNE facilities. Rather, they were designed expressly to prevent the "gaming" of special access tariffs for the provision of specific non-qualifying services (e.g., interexchange long-distance services), as explained in the *Triennial Review Order*.<sup>1</sup> The Commission expressly declined to extend these eligibility criteria to high-capacity loop UNEs, to ensure that all qualifying services identified in the *Triennial Review Order* could be provided over standalone high-capacity loop UNEs. Furthermore, there is no record evidence suggesting that interexchange carriers are using the provision of data telecommunications services over high-capacity loop UNEs to avoid purchasing special access circuits for the provision of long-distance voice services. Indeed, there is no record evidence suggesting that they could practicably do so.

To the extent the Commission continues to feel a need to establish new eligibility criteria for all high-capacity loop UNEs, the Commission can establish new eligibility criteria accommodating the provision of data telecommunications services, which the

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<sup>1</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36, at paras. 591-600 (rel. Aug. 21, 2003).



Commission previously established were “qualifying services” in the *Triennial Review Order*.<sup>2</sup> Specifically, the Commission can establish a new set of eligibility criteria that could be satisfied as an alternative to the existing eligibility criteria for EELs.

Covad suggests the following alternative eligibility criteria. For all new high-capacity loop facilities ordered under an interconnection arrangement established pursuant to new eligibility criteria adopted by the Commission for high-capacity loop facilities (including EELs, DS-1 UNE loops and DS-3 UNE loops), requesting carriers could self-certify that they meet the following requirements:

- (1) That the requesting carrier will provide a data telecommunications service over the requested facilities;
- (2) That the requesting carrier will not solely provide interexchange voice telecommunications service interconnected with the Public Switched Telephone Network over the requested facilities;

– AND –

- (3) That the requested facilities will terminate in a central office collocation arrangement.

These eligibility criteria are obviously broader and less restrictive than the existing EELs eligibility criteria. Such broad criteria for eligibility to provide data telecommunications services are appropriate, however, due to the lack of evidence of gaming by long-distance providers through the provision of data telecommunications services. To further avoid any concerns about gaming of these criteria by non-eligible carriers, the same *post hoc* remedies available to prevent gaming over EELs circuits could be applied to circuits ordered under these alternative criteria. Specifically, as with the Commission’s existing eligibility criteria for EELs circuits, requesting carriers establishing eligibility under these criteria could be subjected to post-order audits to ensure their compliance with their self-certifications under the criteria suggested here.<sup>3</sup>

Of course, for requesting carriers seeking to provide local voice services (whether in combination with data telecommunications services or on a standalone basis), the existing eligibility criteria for EELs would continue to function as the means of establishing eligibility to order high-capacity loop facilities (e.g., EELs, UNE DS-1 loops and UNE DS-3 loops). Furthermore, these eligibility criteria would continue to perform the function for which they were designed and established: to prevent the gaming of

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<sup>2</sup> See *Triennial Review Order*, para. 140.

<sup>3</sup> See, e.g., *id.* at paras. 625-629.



special access tariffs by interexchange carriers seeking to provide long-distance voice services.

Respectfully submitted,

\_\_\_\_/s/ Praveen Goyal\_\_\_\_\_  
Praveen Goyal  
Assistant General Counsel for  
Government Affairs  
Covad Communications Company  
600 14th Street, N.W., Suite 750  
Washington, D.C. 20005  
(202) 220-0400